INDEX

Issue	Page
	2
Reasons for Not Granting the Petition	2
I. There is no conflict between the decision below and decisions of the other Circuit Courts of Appeals.	2
II. The decision below is not inconsistent with prior decisions of this Court.	8
III. There are no constitutional questions or broad policy issues involved.	10
Conclusion	11
Certificate of Service	12

CITATIONS

Cases

Almond v. Kent, F. 2d (4th Cir. 1972)	3,9,10
Baker v. F & F Investment, 420 F. 2d 1191 (7th Cir. 1970)	6
Donovan v. Reinbold, 433 F. 2d 738 (9th Cir. 1970)	7

	Page
Griggs v. Farmer, 430 F. 2d 638 (4th Cir. 1970)	4
Iron Gate Bank v. Grady, 184 U.S. 665, 22 S. Ct. 529, 46 L. Ed. 739	8
Lazard v. Boeing Company, 322 F. Supp. 343 (E.D. La. 1971)	5
O'Sullivan v. Felix, 233 U.S. 318	9
Waters v. Wisconsin Steel Wks. Of International Harvester Co. 427 F. 2d 476 (7th Cir. 1970)	6

Statutes

42, U.S.C. §1982	3,9
42, U.S.C. §1983	9,10
§8-24 Code of Virginia, 1950 (1957 Repl. Vol.)	2,3,9

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-78

LEE A. GIFFORD and CHARLES R. SAMUELS
Petitioners,

v.

JESSE L. ALLEN and CONSTANCE G. ALLEN
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents are in agreement with petitioners's statement of the case, however, respondents believe the issues are improperly stated. The issues raised before the Court of Appeals below are the best statement of the controversy brought before the Court. Very simply the only real issue in this case is:

ISSUE

Whether a cause of action under the Civil Rights Act of 1866 for damages arising out of alleged racial discrimination in the sale of real estate is governed by the Virginia two-year period of limitations for "every action for personal injuries" under Section 8-24, Code of Virginia, 1950 (1957 Repl. Vol.), or by the one-year period under the same section for personal actions "for which no limitation is otherwise prescribed" which do not survive at common law.

REASONS FOR NOT GRANTING THE PETITION

I. There is no conflict between the decision below and decisions of the other Circuit Courts of Appeals.

The question decided by the Fourth Circuit Court of Appeals below was whether the two-year Virginia

Statute of Limitations for "personal injuries", §8-24 Code of Virginia, 1950 (1957 Repl. Vol.), applied to a cause of action for racial discrimination in the sale of real estate arising under §1982 of Title 42, U.S.C. The Court of Appeals in a per curiam opinion, following its previous ruling in Almond v. Kent, F. 2d (1972), both of which are reprinted in petitioner's appendix, held that Virginia's two-year statute of limitations applied to civil rights actions under §1982 rather than the one-year period which applied to torts of a transitory nature not surviving under common law. The Virginia Statute does not make specific provision for civil rights actions and there is no general catch-all statute as in some states; the Virginia scheme appears to be designed to cover all possible common law actions.

Petitioners argue that the relief sought, compensatory and punitive damages for humiliation and embarrassment, as distinguished from the cause of action--deprivation of civil rights, has not been held to survive under Virginia law and that, consequently, respondents' cause of action was barred by the one-year period. This position is untenable.

It is not the relief sought that determines the period of limitations, but the nature of the cause of action: not the form in which the suit is instituted, but the object of litigation, Almond v. Kent, supra, A.13. Griggs v. Farmer, 430 F. 2d 638 (4th Cir. 1970), cited by petitioners in support of their position has no application to the question at bar because that case dealt with common law causes of action clearly encompassed by Virginia's Statutory scheme.

The issue is not whether a civil rights action would survive at common law as petitioners' urge, because indeed civil rights actions are not common law actions, or whether suits for punitive damages are governed by the one-year period, but what is the appropriate period of limitations for a cause of action for which several remedies may be fashioned by a federal court. See Lazard v. Boeing Company, 322 F. Supp. 343, 346, (E.D.La. 1971), where the defendants had urged that plaintiff's action under the 1866 Civil Rights Act was for tort or back wages which would require application of Louisiana's one-year prescriptive period and the Court said:

> Considering the breadth of the remedy available under §1981, it would be erroneous to characterize the action as merely one for tort or back wages . . . In reality this cause of action is one for discrimination, the cure

for which, as stated above, may be any one of a number of remedies.

The Louisiana District Court cited this Court's decision in Sullivan v. Little Hunting Park, 396 U.S. 229, 239, 90 S. Ct. 400, 405, 24 L. Ed. 2d 386, where the Court said "[T]he existence of a statutory right implies the existence of all necessary and appropriate remedies."

Other circuit courts have followed similar approaches to their separate problems of applying state statutes of limitations to civil rights actions. In both Waters v. Wisconsin Steel Wks. of International Harvester Co., 427 F. 2d 476 (7th Cir. 1970), and Baker v. F & F Investment, 420 F. 2d 1191 (7th Cir. 1970), for example, certain specific periods of limitations under Illinois law were rejected and the Court applied the state's five-year period for civil

rights actions not otherwise provided for. See also Donovan v. Reinbold, 433 F. 2d 738 (9th Cir. 1970).

The Virginia Statutory scheme contemplated that personal actions other than actions for personal injuries would be divided into two categories, those surviving and those not. A civil rights action simply cannot be forced into this formula. The logical and consistent approach is to apply the two-year period generally as the Court below did, considering the ambiguity of the Virginia Statute and the importance of the federally created right. The resolution of the question of the application of Virginia's Statute of Limitation is consistent with sound principles of federal law.

II. The decision below is not inconsistent with prior decisions of this Court.

Petitioners' cite Iron Gate Bank v. Brady, 184 U.S. 665, 22 S. Ct. 529, 46 L. Ed. 739, in support of their petition. That case construed Virginia law and held that a cause of action for malicious and wanton conduct in serving a distress warrant did not survive either under common law or statutes of Virginia. That case has no application to the issue raised at bar. It did not deal with civil rights and its reasoning does not apply to a civil rights action which is not dependent upon state law conceptions of survivability of actions. Respondent is unaware of any prior decision of this Court setting forth either principle or precedent inconsistent with the decision below. To the contrary, the decision below is in harmony with the well established rule

requiring federal courts to apply the limitations period fixed by the law of the state in which the action arises. O'Sullivan v. Felix, 233 U.S. 318 (1914) Since Virginia has no statute which is specifically made applicable to civil rights actions, it is necessary to apply and construe the Virginia general statute which the parties agree is the one to be applied. The dispute is narrowly drawn over the proper application of §8-24, Code of Virginia, 1950 (1957 Repl. Vol.).

The Court below, considering the difficulty in fitting a civil rights action into Virginia's statute in Almond v. Kent, supra, A. 13, said that "[i]n the broad sense, every cause of action under §1983 which is well-founded results from 'personal injuries'". The Court concluded that Virginia's two-year period applying to "every action for personal injuries" (emphasis added) applies

generally to §1983 suits. In this case below the same application was made to §1982 suits. Alternatively, in Almond v. Kent, supra, A. 14, the Fourth Circuit said that a civil rights action was more important than the transitory torts falling under the one-year period of limitations and therefore more properly belonged at the "two-year step in Virginia's statute of limitations scale of values".

III. There are no constitutional questions or broad policy issues involved.

There is no constitutional issue raised nor are there any issues of broad application involved in this case. The question is limited to a narrow application of Virginia's statute of limitations to a federal cause of action under a long established borrowing principle. Federal courts, although they must apply the

state statute are not required to abandoned the remedial purposes of the Civil Rights Act, or to force civil rights actions into a state scheme of limitations that obviously did not contemplate such actions or purport to prescribe specific provisions for such contingencies.

CONCLUSION

For the reasons set out above the Petition should not be granted.

Respectfully
submitted,

/s/ Stanley E. Sacks

Stanley E. Sacks
SACKS, SACKS & TAVSS
First & Merchants National Bank Bldg.
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I, the undersigned, attorney for the respondents, do hereby certify that I have served three copies of this Brief in Opposition to the Granting of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on each other party separately represented in this proceeding by deposition the same in the United States mail, with first class postage prepaid, addressed to each counsel of record, at his Post Office address:

Norris E. Halpren, Esquire
906 Maritime Tower
Norfolk, Virginia 23510

Gordon E. Campbell, Esquire
1340 Virginia National Bank Bldg.
Norfolk, Virginia 23510

All parties required to be served have been served this 10th day of August, 1972.

By Stanley E. Sacks
Stanley E. Sacks, Counsel for
Jesse L. Allen & Constance G.
Allen